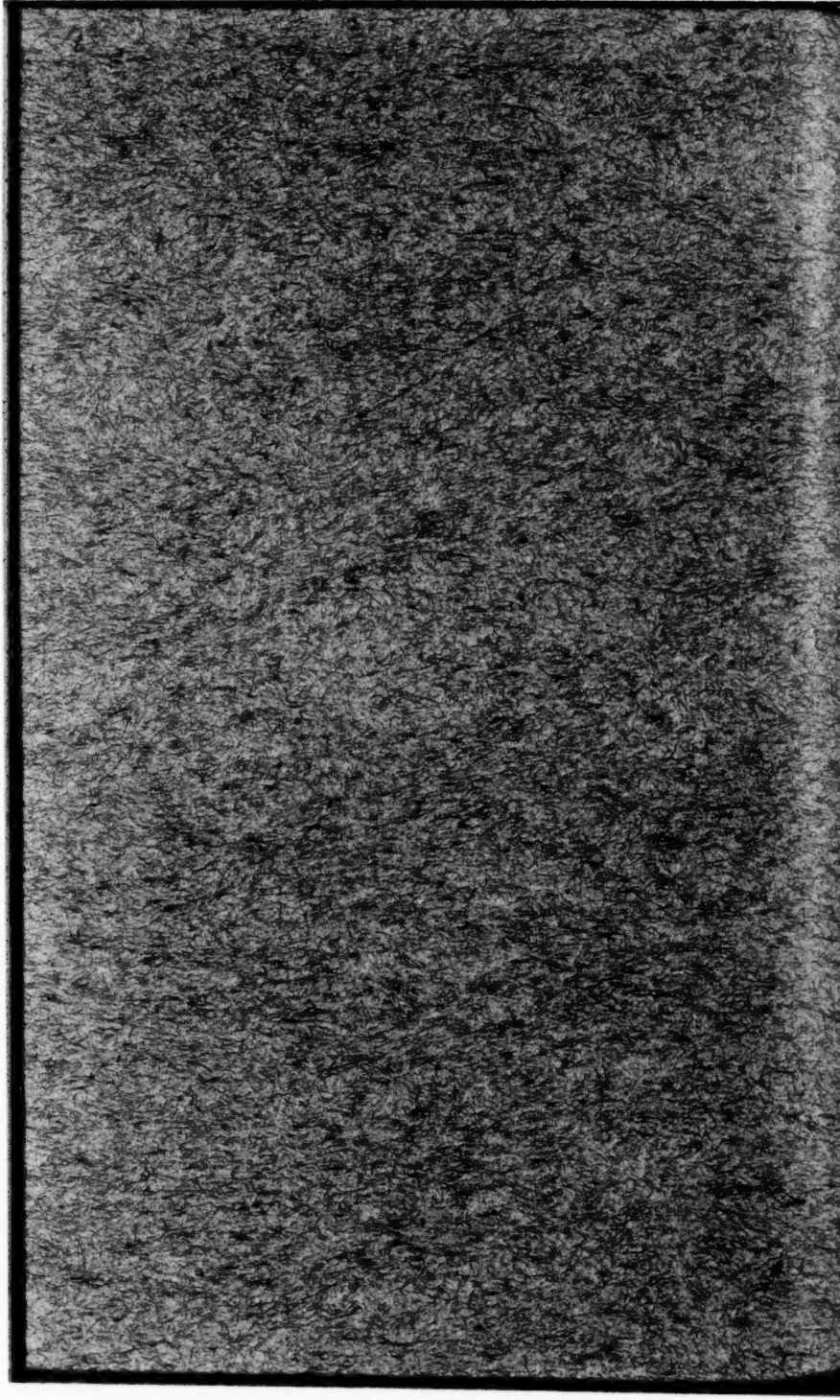

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 935

LOUIS COMPAGNA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 942

FRANCIS MARITOTE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 946

LOUIS KAUFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 4191–4201) is reported in 146 F. 2d 524.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on January 11, 1945. Petitions for rehearing were denied on January 8, 1945 (R. 4202–4204). The petitions for writs of certiorari were filed on or before February 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the indictment and the proof with respect to venue and knowledge by the grand jury of persons referred to in the indictment as unknown.

2. Whether in a prosecution for conspiracy to violate the Anti-Racketeering Act by extorting funds through fear of violence, it was prejudicial error to permit testimony by the payors as to the motives that induced them to make the payments.

3. Whether the summation of the prosecutor was improper.

4. Whether the trial judge failed properly to instruct the jury in respect of (a) the statutory exemption in favor of bona fide union activities, (b) interstate commerce, (c) the statute of limitations, and (d) the effect of a plea of guilty; and (e) whether the judge committed reversible error in referring to petitioners' right of appeal.

5. Whether the judge's statement to the jury, made out of the presence of counsel, that he would read requested evidence to them after lunch constituted a private communication requiring reversal of the convictions.

6. As to petitioner Kaufman, whether the evidence was sufficient to support his conviction; and whether there was error in admitting evidence against him and rejecting evidence offered in his behalf.

STATUTE INVOLVED

The Act of June 18, 1934, c. 569, 48 Stat. 979 (18 U. S. C. 420 (a), (d)), provides in pertinent part as follows:

> SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—
>
> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

* * * * *

SEC. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: *Provided,* That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

STATEMENT

Petitioners were indicted in the United States District Court for the Southern District of New York upon a single count charging a conspiracy under the Act of June 18, 1934, commonly known as the Anti-Racketeering Act, to obtain by force, violence and coercion, in connection with acts af-

fecting interstate and foreign trade and commerce, the payment of upwards of $1,000,000 from a group of persons and corporations in the motion picture industry.

In substance, the scheme alleged was one to dominate and control the International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada, a labor union (referred to throughout the record and herein as IATSE), and through such control to extort from the industry for the defendants' and co-conspirators' own use and benefit the substantial sums charged. The indictment alleged that such sums were to be paid for "protection," namely, to dissuade and prevent the confederates from obstructing the production, distribution and exhibition of motion pictures throughout the United States and otherwise injuring and destroying the business of the victims. None of the defendants, except petitioner Kaufman, was alleged to have had any official connection with the union. The co-conspirators George E. Browne, William Bioff and Nick Circella, however, named but not indicted,[1] were described as officials and petitioner Kaufman as business agent of Local 244 of the IATSE (R. 4–6). The defendant Nitto died of a "bullet wound of head" on the day of the filing of the indictment and the case was severed and

[1] Browne, Bioff and Circella were previously successfully prosecuted for the same offense.

nolled as to him (R. 9–10). The court dismissed the indictment against Pierce, another defendant, and the remaining seven were convicted by the jury (R. 3793). Petitioner Kaufman was sentenced to imprisonment for seven years and to pay a fine of $10,000 and the others were each sentenced to imprisonment for ten years and to pay a fine of $10,000 (R. 4026–4032). On appeal the judgments were affirmed (R. 4202–4204).

The evidence for the Government may be summarized as follows:

Prior to 1932, the co-conspirator Browne, a former stage hand in Chicago, had been the business agent of the Chicago Local and an international officer of IATSE (R. 1015–1017). In 1932 he ran for international president of the union but was defeated (R. 1018). Shortly thereafter he met the co-conspirator Bioff, who knew and had worked in various illicit enterprises for some of the defendants (R. 1021, 105–108). Bioff and Browne formed an association and divided between themselves Browne's income, partly legitimate and partly illicit (R. 114, 116, 122, 1023, 1028).

Browne and Bioff spent considerable money at a night club owned by the co-conspirator Circella, alias Nick Dean (R. 122–124, 1029) and apparently attracted attention to themselves for they subsequently were summoned separately before one Frank Rio (deceased prior to the indictment) (R. 125–126, 129, 1031–1032), one of the

leaders (R. 129) of a group of underworld characters in Chicago, including petitioners Compagna, deLucia, D'Andrea, Maritote, Gioe, and the late Frank Nitti, who referred to themselves as "the outfit" (R. 182, 193, 324, 325, 915, 1043, 1044, 1132). As the result of Rio's terse conversations (R. 130–134, 1032–1033) Browne and Bioff agreed to pay to the "outfit" one-half of all the two might collect from the motion picture industry (R. 130–132, 1044). In early 1935, after some money had been extorted, as hereafter described, Browne and Bioff were again summoned before the heads of the "outfit," including Compagna, deLucia and Nitto. On the claim that they had a large organization, "a big family," and needed money, the distribution ratio was revised upwards, the "outfit" taking two-thirds of the prospective spoils, and leaving one-third to be divided between Bioff and Browne (R. 181–183, 1053–55). This latter proportion continued throughout the conspiracy.

Between March and May 1934, shortly before the biannual IATSE convention at which officers were to be elected, the "outfit" heads had several meetings with Bioff and Browne at Riverside, Illinois, to formulate plans for their future operations. Among those present were petitioners Compagna, deLucia, Circella, Rio, Nitto (R. 136, 141, 1036–1038) and, on one occasion, one Louis "Lepke" Buchalter (R. 141). They discussed prospects of making a million or two million dol-

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lars (R. 1039); their relationship as a partnership; the necessity for Bioff's and Browne's loyalty; and the penalty if Browne and Bioff were "caught wrong" (R. 138). They planned the condition precedent to the success of their schemes, namely, the engineering of Browne's election as international president of the IATSE, and agreed to utilize the "outfit's" nation-wide connections to elect Browne president (R. 139–145, 1037, 1039). Arrangements were made to send certain members of the "outfit" to the convention to see that the persons so reached lived up to their commitments (R. 144, 1039–1040). In this connection the names of petitioner Kaufman and one Abner "Longie" Zwillman were brought into the picture: at one meeting, Nitto stated that they would "take care of Jersey through 'Longie' Zwillman," their "contact" in that state (R. 140); and, at a later meeting, when ordered by Nitto to get in touch with Charles "Lucky" Luciano and inform him that Local 306 of New York was to vote for Browne, Buchalter replied, "I don't have to see Lucky on that, Frank, I handle that myself, I will take care of it; I will also see Kaufman of Jersey, I will see 'Longie' and see to it that 'Longie' delivers Kaufman" (R. 145).

In June 1934 at the IATSE convention in Louisville, Kentucky, Browne was unopposed and unanimously elected international president (R. 146, 1041). Members of the "outfit," including

petitioner Maritote and Louis Buchalter, attended as planned, and found relatively little to do except to "make themselves conspicuous" (R. 145–146, 1058, 2067–2070, 3134). Their hotel bills were paid by the union (R. 1041, 2037–2038).

Shortly after the election of Browne, a further meeting was held at Riverside attended by petitioners Compagna and deLucia. Instructions were given to Bioff and Browne that Circella was to attend all their meetings with persons in the industry and was to be kept informed of all developments (R. 149, 1042). Bioff and Browne were told, "We ought to get ourselves organized and start getting some dough" (R. 149).

Thereafter, in a matter of months, the "outfit" acquired direct control of Chicago Local 110 of the IATSE. In February 1935 one Maloy, business agent of Local 110, was assassinated and thereupon Browne, against his will but at the command of the "outfit" transmitted through Circella, placed the local under international rather than autonomous supervision (R. 159, 1050–1051). Between February and December 1935, Circella ran the affairs of Local 110 (R. 233–234). Thereafter, and continuing as late as May 1942, the local had two successive business agents over whom the "outfit" maintained rigid control and who, with their assistants, were required to divide their salaries ($400, $250, $175 per week, respectively) with the "outfit" (R. 2207–2210, 2215, 2228–2229). The

control by the "outfit" was so rigid that Browne was unable to abolish the so-called "permit system" in Local 100 because Compagna refused to grant him permission to do so (R. 1103–1106).

Rio, one of the "outfit's" chieftains, directed Bioff to threaten to double the number of operators working in projection booths in theater chains in Chicago, stating that this threat would undoubtedly result in "some money coming up" (R. 166). By yielding to threats on the part of Bioff (R. 168–180, 352) the industry in Chicago paid over $100,000 in 1935 and tens of thousands of dollars annually in subsequent years. These payments were made to Bioff and Circella as late as December 1940 (R. 262, 330–331, 1722–1728). Among theater operators in Chicago was one Barger who owned the Rialto Theater which alternated the showing of motion pictures with stage shows and dealt with both stage hands and operators locals of the IATSE in Chicago. The motion pictures shown in the theater represented the products of all major companies (R. 2110, 2115). Beginning in April 1935 under repeated threats by Bioff to close Barger's business, the "outfit" secured a 50 percent interest in the theater's profits, amounting ultimately to $35,200 (R. 2121, 2130, 2132). The money was delivered by Bioff to deLucia and Compagna at different times (R. 296–297). In the fall of 1935 it came

to the attention of Nitto, deLucia, Compagna and others of the "outfit" that Barger was drawing a personal salary of $200 per week. Thereupon, pursuant to instructions of the "outfit," an ultimatum was transmitted to Barger that "unless one of our boys were put on the pay roll for $200 a week, he could not operate that theater" (R. 299–302, 304). Over a vehement protest, Barger complied (R. 304, 2122–2123). Petitioners Maritote (referred to in the record as Diamond) and D'Andrea, successively, were designated by Circella to fill this "position" (R. 304–305, 2133). Maritote was paid $175 [2] per week in currency, totaling $13,650 (R. 2125–2127). D'Andrea took his place and received $48,109.25 (Ex-34, R. 3880–3883). Neither performed any services in return for such payments (R. 2134, 2143).

In the early fall of 1935 the "outfit" extended its operations to the city of New York where a labor controversy was pending between the New York local of the IATSE and the exhibitors. After being exposed to sabotage in the theaters (R. 1466–1467), the local representatives of theater operators collectively paid $150,000 to Bioff and Browne through an intermediary (R. 196–201, 1062–1064). No assurance was ever

[2] During the time that Maritote and D'Andrea were paid $175 per week, D'Andrea's sister was placed on Barger's pay roll at $25 per week; when she left, D'Andrea, at Circella's insistence, was "raised" to $200 per week (R. 2136–2138).

given that this money was to go to the union (R. 202).

In 1936 petitioners' activities were extended to the producing units of the industry. At the time of Browne's election in 1934, the IATSE controlled only motion picture machine projectionists and stagehands in theaters. In November 1935, by calling a successful strike on hundreds of Paramount houses located in the Middle West, and under threat by Browne to order a strike on all theaters owned by producing companies, the IATSE after a meeting of interested parties at the Union League Club in New York, was given the control of studio workers and a closed shop on the West Coast (R. 1083–1084, 1333–1337). Using the power acquired over both the exhibition and the production ends of the industry, substantial sums were demanded from the producers. Bioff told the producers that unless payment was made "we will close every theater that is owned by the affiliated companies" and reminded them of the 1935 strike (R. 1340–1341, see R. 1343, 1549, 1811). It was emphasized, however, that these demands had nothing to do with the wage scale or any of the other open negotiations since the men of the union had to be paid and paid well (R. 1811; see R. 1347). At first $2,000,000 was demanded, subsequently $1,000,000, and later, the sum demanded was fixed at $50,000 per annum for

the large producing companies and $25,000 per annum for the small companies (R. 1094, 1340–1344, 1548–1550, 1614–1615, 1806–1812).

As the result of these "negotiations," four large motion picture producing companies paid Bioff some $400,000 in 1936, 1937 and 1938 (R. 224–229, 740, 746; 1347–1349, 1550–1556, 1815–1822). By a complicated arrangement whereby the "outfit" became the recipient of a commission in the purchase of raw films, payments from one of the producing companies continued until May 1941 and totaled an additional $236,469 (R. 264–265, 1349–1355, 1477–1489, 1497–1506).[3]

---

[3] With regard to collections, proof in record concerning payments by producing and exhibiting theater companies shows the following sums to have been paid to Browne, Bioff, Circella, Maritote, D'Andrea, Kaufman and associates:

Description	*Amount*	*Record*
Collections from theater companies (Chicago area).	$290,059	171, 173, 330, 331, 354, 1718, 1719, 1721, 1726, 2121, 2127, 2130, 2133, Ex. 34, 3879.
Collections from theater companies (New York area).	150,000	200, 476.
Collections from theater companies (Newark area).	20,500	995, 965–6, 969, 970, 1003–1004, 1006, 1008.
Collections from theater companies (California area).	25,000	354–355.
Collection through commissions on film purchase contract.	236,469	264–265, 1349–1355, 1477–1489, 1497–1506.
Collection from producing companies.	400,000	224–228, 229, 740, 746.
	1,122,028	

Petitioner Rosselli was introduced to Bioff as the "outfit's" representative on the West Coast whose function was to supervise the activities of Bioff and Browne in that area (R. 153, 824). On direction of Nitto (R. 212, 829), Rosselli was placed "on the pay roll," at first being paid $150 per week by padding union pay rolls (R. 245) and later $194 a week out of extorted funds (R. 292, 834–843). Rosselli, who performed no services for the union for this stipend (R. 249, 1892), knew the source of the monies which were paid to him (R. 355–356). He discussed with Compagna and Bioff the failure of one of the proposed victims to pay (R. 279) and generally participated and maintained the "outfit's" interests whenever it was necessary (R. 249–252, 336–339, 1891–1896). In all, between 1936 and 1941, illicit payments to Rosselli totaled approximately $50,000.

Charles Gioe (referred to in the record as Joy) appears in a slightly subordinate capacity to the heads of the "outfit," being identified with Compagna and deLucia as one of those to whom Bioff delivered the "outfit's" share of the money obtained by Bioff (R. 180, 299). He attended meetings of the chieftains of the "outfit" in Chicago (R. 259, 316, 2040), directed Bioff in respect of his relations with the union (R. 316–317), and was to be the beneficiary of an attempted seizure by the "outfit" of the Actors

Union which Gioe stated was to be his "organization" (R. 326). He attended conventions of the IATSE apparently as a representative of the "outfit" (R. 241–243, 1108, 1127–1128, 2220), and generally supervised their interests in thwarting an attempted withdrawal by Bioff from the conspiracy[4] and in attempting to pervert and obstruct the investigation and prosecution of the "outfit" (R. 345–347, 770, 1132–1133, 2225–2226).

Petitioner Kaufman was business manager of Local 244 of the IATSE which had a contract with Warner Bros. in northern New Jersey, expiring September 1, 1936 (R. 951–953). In 1932, shortly after the appointment of Jacocks as zone manager for Warner Bros. in the Newark area, Kaufman, Oppenheim, and Gehring introduced themselves to him and assured him it would be "good business" for him "to get along with them." During the conversation Gehring put a revolver on Jacocks' desk (R. 952–953). Begin-

[4] In the summer of 1940, Gioe informed Bioff that it was the order of the "outfit" that Circella resign his connection with the IATSE. Bioff replied that if Circella was to resign, he and George Browne would also quit (R. 331–332). The following day Gioe returned with Compagna. Bioff's testimony concerning this incident is as follows: "Compagna said, 'I understand from Charley (Gioe) that you told him you were going to resign; is that right?' I said, 'Yes, sir.' He says, 'Well, anybody resigns resigns feet first.' He said, 'You understand what that means.' I says, 'I do.' He says, 'Now go ahead,' and that was the end of it, and I didn't resign" (R. 332).

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ning in August 1936, a number of conferences looking to a new contract were held in Newark and New York City between Jacocks and Morgenroth, respectively, zone manager and labor relations man, representing Warner Bros., and a wage scale committee, Kaufman and two other officers (Oppenheimer and Gehring) representing the union (R. 953–954). The wage scale committee dropped out during the negotiations and in early October a final agreement was reached orally with Kaufman and his co-officers alone (R. 954). While the conferences were in progress, Kaufman complained to Bioff that he was having trouble in the negotiations and asked for his "help" (R. 254). Bioff then went to one Phelps, a "labor contact man" for Warner Bros., who told him Kaufman was unreasonable and threatened to strike and that Phelps was looking to Bioff "to see to it that we get straightened out" (R. 255). Bioff answered that he would not let Kaufman strike (under the IATSE constitution only Browne could authorize a strike) but advised Phelps to "get straightened out with Kaufman even if it costs some money" (R. 945). On October 26, 1936, after a contract had been verbally agreed upon, Jacocks was summoned to Warner Bros.' New York office where, after conversing with one Willard Patterson, who was in charge of company labor relations nationally,[5] Jacocks was

[5] Patterson had died before the trial (R. 955).

given $15,000 in currency which he brought to Newark and which Morgenroth delivered to Kaufman on the following day (R. 954–957, 1003–1004). Morgenroth asked Kaufman whether he had to "split that money with any of the other fellows" and Kaufman replied, "No; they know nothing about it. I don't get a cent of this money. I have to go across the river" (R. 992). Later Kaufman told Jacocks he "had to take that money over the river and turn it over and he did not get any of it" (R. 959). The money was paid before the new contract, orally agreed upon, was signed (R. 987).

The 1936 contract expired at the end of August 1939. Negotiations for a new contract were opened and conferences held as in 1936, the parties being the same except that Kaufman alone represented the union after the wage scale committee had retired. In these proceedings Kaufman demanded $10,000 and told Jacocks that he had to pay to Bioff the whole $15,000 received in 1936. After consultation with his New York superiors, Jacocks informed Kaufman they would only pay $5,000 in two installments, to which Kaufman agreed, and upon payment of the first $2,500 in currency in 1939, the new contract was signed (R. 966–970, 993–995, 1007–1008). The second $2,500 installment was paid in currency in August 1940 (R. 970, 1008). Thereafter, in conversation with Morgenroth, Kaufman repeated that he had not received any of the original $15,000

but had to turn it over to Bioff, expressing the opinion that he had told Morgenroth so previously (R. 996). In 1937, Kaufman also received $500 in currency from Warner Bros., in connection with employment of standbys, after he had demanded $1,000. In collecting the money, Kaufman refused to accept a check to his order (R. 962–966, 992–993, 1004–1007; Ex. 8, R. 3858).

Bioff testified that when he learned of the $15,000 collection, not having received it from Kaufman, he protested to Nitto requesting instructions as to whether to see Kaufman and get some of the money; that Nitto's reply was, "No, don't bother Louis, he is Longie's (Zwillman's) man, and just leave it alone" * * * and that Kaufman was not bothered (R. 256–258).[6]

ARGUMENT

1. Petitioners contend (C. Pet. 12, 20, 23, 24, C. Br. 3, 5–7, 14–31; K. Pet. 9–10, 10–22, 31–32) [7]

[6] Jacocks testified that Kaufman occasionally referred to Zwillman as "the big boss" (R. 971). Morgenroth observed Zwillman and Kaufman at luncheon with Oppenheimer and Gehring, the two Local 244 officials who participated with Kaufman in the 1936 contract negotiations after the union's wage scale committee had dropped out (R. 977); and Flaherty, a Warner Bros. employee who participated as payor or witness in all four payments to Kaufman, was introduced to Zwillman by Kaufman at a Local 244 dinner in Newark (R. 1008–1009).

[7] The petition and brief filed on behalf of petitioners Compagna, et al. are referred to as C. Pet. and C. Br. respectively. The petitions filed on behalf of petitioners Maritote and Kaufman are referred to as M. Pet. and K. Pet., respectively.

that there was a fatal variance between the indictment and proof in respect of venue and the knowledge by the grand jury of persons referred to in the indictment as unknown.

(a) *Venue.*—The indictment alleged that from June 18, 1934, and continuously thereafter in the Southern District of New York the petitioners and their confederates conspired to violate the statute (R. 4–6). The proof shows that the initial agreement by which the "outfit" planned to dominate the union and to secure the election of Browne as president occurred in Chicago in 1934 and that it was not until 1935 that the conspirators extended their operations to New York (see *supra,* p. 11). The proof does, however, establish numerous acts of the conspirators committed in the Southern District of New York, including measures of great importance to the extension of the conspirators' power over the movie industry. Thus, the Union League Club meeting by which the IAT regained its status among the Hollywood studio workers, the obtaining of the $150,000 from the New York theater operators, the negotiations for payments of large sums by the producing companies, and a major portion of such payments by the producing companies, all took place in the Southern District of New York (see *supra,* pp. 11–13).

The venue of this action was therefore properly laid in the Southern District of New York. Sec-

tion 6 of the Anti-Racketeering Act specifically provides:

> Any person charged with violating Section 420 (a) of this title may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators—

The same rule applies in the absence of a venue provision. *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150, 252; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 402–403. Since a continuing conspiracy, such as was here proved, "is in effect renewed during each day of its continuance", *United States* v. *Borden Co.*, 308 U. S. 188, 202, the indictment properly charged that petitioners and their confederates "conspired" in the Southern District of New York. See *Hyde* v. *United States*, 225 U. S. 347, 367, where this Court rejected the same argument that petitioners make here that an allegation of conspiracy within the district was not supported merely by proof of overt acts within the district. The only variance between the indictment and the proof was the variance in the date on which the conspiracy commenced to operate in the Southern District of New York, clearly an immaterial element. *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *Hood* v. *United States*, 23 F. 2d 472, 475 (C. C. A. 8), certiorari denied, 277 U. S. 588.

Contrary to petitioner Kaufman's contention (K. Pet. 19, 31–32), there was proof of an overt act within the Southern District of New York during the three-year period prior to the return of the indictment, although other overt acts were stressed by the prosecution as showing the existence of the conspiracy within the period of limitations. In the summer of 1942 petitioner D'Andrea, within the Southern District of New York, questioned the witness Barger as to his testimony before the grand jury (R. 2143–2145). That this was during the life of the conspiracy is shown by the fact that subsequently D'Andrea attempted to secure further funds from Barger, taking Ralph Capone with him to enforce his demands (R. 2148–2150), and that it was in furtherance of the conspiracy as a guide to future operations is a permissible inference which the verdict appears to have made. In any event, we do not believe that it was necessary to prove overt acts within the Southern District of New York during the period of limitations. The crime of conspiracy was committed within the Southern District of New York, and petitioners were therefore tried within the district where the crime was committed as required by the Sixth Amendment. Proof of acts in furtherance of the conspiracy within the period of limitations was, of course, necessary to show that the prosecution was not barred by the statute but such proof did not change the char-

acter of the crime nor the place of its commission. Since the conspiracy had not terminated within the period of limitations, petitioners were properly tried in the district where part of the offense was committed. The validity of such a rule is shown by the evidence in this case. One of the important items of proof establishing the continued existence of the conspiracy within the period of limitations was payment by means of the raw film purchasing contract as late as 1941 (*supra*, p. 13). Although the payments were made in California (R. 1477–1480, 1498, 1504–1505), and in part delivered in Chicago (R. 1129) the arrangement for such payments was made in the Southern District of New York (R. 1348, 1351, 1352).[8]

(b) *Unknown parties.*—Petitioners argue (C. Pet. 19, 23, 24, C. Br. 7, 29, 31; K. Pet. 10, 20–22) that there was a fatal variance in the failure to name in the indictment certain persons whose

[8] Petitioner Kaufman erroneously states (K. Pet. 10, 22) that a bill of particulars was denied. The record discloses that on motion by petitioner Compagna and others Judge Hulbert granted two items of particulars not sought in conformity with a previous decision in the Browne and Bioff case [unreported] (R. 40). On a prior indictment the trial court had granted Kaufman the right to particulars as to "what places other than the Southern District of New York the acts charged in the indictment were committed". In this case Kaufman entered into a stipulation whereby he was deemed to have made a similar motion for a bill of particulars, and to have had it decided in the same manner. (R. 13a, 18–18b.) Petitioners failed to submit orders embodying these decisions.

names must have been known to the grand jury. One such person is Zwillman, who was mentioned several times as the New Jersey "contact" of the "outfit" (see *supra,* p. 8). While this evidence may disclose enough to warrant suspicion, it was not in itself sufficient to link Zwillman with the conspiracy here involved, and it may be assumed that the grand jury considered itself unwarranted in so naming him on the evidence before it. As to Rio, the evidence shows that, although he was a leader of the "outfit" in 1934 when the arrangements were made to elect Browne president of the union, he died early in 1935 before the major activities here involved were undertaken (R. 166).

The other alleged variance is the failure of the indictment to name as one of the victims Barger, the operator of the Rialto Theater in Chicago, who was forced into a "partnership" with the "outfit" and who was compelled to employ petitioners Maritote and D'Andrea (see *supra,* pp. 10–11). As authority for holding the variance fatal, petitioners rely upon *United States* v. *Riley,* 74 Fed. 210 (C. C. Ky. 1895), a case not involving a conspiracy. Here the name of the victim was in no way a part of the offense charged; indeed the conspiracy would have been punishable even if it had not been successful. Hence, the variance is not material. Cf. *United States* v. *Heitler,* 274 Fed. 401, 403–405 (N. D. Ill.), affirmed, 289 Fed. 1021 (C. C. A. 7);

Leverkuhn v. *United States*, 297 Fed. 590, 592 (C. C. A. 5), certiorari denied, 266 U. S. 603; *Jones* v. *United States*, 11 F. 2d 98, 100 (C. C. A. 4), certiorari denied, 271 U. S. 682. A variance is not fatal unless it affects "substantial rights." *Berger* v. *United States*, 295 U. S. 78, 82. There could have been no element of surprise here because the evidence affirmatively discloses that petitioners knew that Barger had testified before the grand jury, for D'Andrea questioned him twice and was apprised of the nature of Barger's testimony (R. 2144–21145, 2151–2152).

2. Petitioners argue (C. Pet. 15–16, 21, C. Br. 3–4, 9, 53–61, K. Pet. 12, 16, 32–33) that it was prejudicial error to permit victim witnesses to testify to their reasons for paying money to Bioff. The testimony to which they object falls into two categories—(1) statements by several victims elicited on direct examination that they paid the money because they were afraid the theaters would be closed and they would be financially ruined (R. 960, 1337, 1355, 1550–1551, 1558, 2152),[9] and (2) evidence, usually adduced on redirect examination of the victims, that they feared violence and had experienced violence in former strikes (R. 1467, 1558, 1660, 1799, 1801). The division of

[9] The testimony of Warner on direct examination, that he knew "the record of these people, a murder or two to their credit" (R. 1557; see Br. 55) was stricken out by the court (R. 1558).

opinion in the Circuit Court of Appeals (R. 4196–4198) was apparently only on this latter testimony, i. e., fear of violence. Most of this evidence to which petitioners refer (C. Br. 54, 56)—statements by the witnesses Schenck and Coston (R. 1467, 1799, 1801)—was opened up by defense counsel who, on cross-examination, questioned Schenck at great length about his mental processes before he agreed to pay the money to Bioff (R. 1356, 1387, 1395–1404, 1409–1412), and cross-examined Coston about payments made in 1932 following the strike in 1931 at which violence occurred (R. 1754, 1756, 1757–1759).

Apart from this consideration, we submit that the majority of the court below was correct in holding admissible the testimony of the victims' state of mind at the time of payment. As all three judges below agreed, such evidence would be clearly admissible on a trial for the substantive offense. *Nick* v. *United States,* 122 F. 2d 660, 671 (C. C. A. 8), certiorari denied, 314 U. S. 687; *Greater New York Live Poultry C. of C.* v. *United States,* 47 F. 2d 156, 159 (C. C. A. 2). Since evidence of the commission of the substantive offense is always evidence of a conspiracy, we see no reason why evidence proving the crime should not be admissible in a prosecution for conspiracy. While this Court in *United States* v. *Local 807,* 315 U. S. 521, stated that the motive of the payors is not the controlling factor in determining

whether payments were demanded for a bona fide purpose, it did not hold that proof of such motive is irrelevant in determining whether the payments were in fact extorted.

Moreover, whatever may be the general rule, in this particular case the evidence was directly relevant to the issues before the jury. The theory of the defense, articulated by counsel in their opening argument (R. 84–85, 87–88), was that the moneys given to Bioff were voluntary bribes, not paid under duress. The victims' state of mind in making the payments was thus put in issue by petitioners themselves, and they are in no position to complain because the evidence on that issue proved unfavorable to them.

3. The objections to the prosecutor's closing argument (C. Pet. 20, 22; C. Br. 4, 72, 69–77; M. Pet. 7, 19–21; K. Pet. 17–18, 29–30) assume that the prosecutor painted a lurid and unwarranted picture of petitioners' activities. But the Government was here prosecuting a group characterized by the Circuit Court of Appeals as "a gang of confederates who lived by blackmail" (R. 4192) whose crime "struck at the heart of civilized society" (R. 4198). A fair summation of the evidence could not fail to present petitioners in a less than favorable light. The answer to petitioners' objections to the argument of counsel is that the statements of which they complain are amply supported by the evidence. Thus peti-

tioners state (C. Br. 70) that the prosecutor erroneously referred to evidence of the conversation between Bioff and Korshak which had been stricken from the record, but the fact is that, after the testimony had been stricken on direct examination, the subject was explored by defense counsel on cross-examination (R. 403, 405–409, 414, 724) and was then testified to on redirect and recross-examination (R. 915–921, 932–934). The testimony as to a deposit by union officials to the credit of deLucia's child (see C. Br. 70) was mentioned by the prosecutor for the same purpose for which it was admitted, that is, to show association (R. 314), and far from being used as an appeal to prejudice, was referred to merely as opening an account for a "member of deLucia's family" (R. 3702). It was a fact established by the evidence that Bioff was convicted of pandering while he was working for Rio, Circella and D'Andrea (R. 105, see R. 3638) and Bioff did testify, as the prosecutor stated, that in an application for life insurance he named D'Andrea's brick yard company as his employer (R. 106–107, see R. 3685).

Similarly, Bioff testified that the "outfit" sent men to Chicago to "see to it that those who pledged to go along with us would live up to their promise" (R. 144), that the delegation which appeared included petitioners Maritote [Diamond] and Circella, and that they all made themselves

conspicuous among the delegates (R. 145–146). The prosecutor's summation of this testimony (R. 3639, 3641; see C. Br. 70, 71; M. Pet. 6, 7, 11, 19–20) was therefore fully justified. The summary of Sherman's testimony (R. 3640; Pet. 71) was an accurate account of what occurred when Sherman was on the stand (see R. 3134–3135). There was considerable evidence in the record as to an attempt by the IATSE to gain control of the actors' union (R. 323–326, 1123–1126) and when the prosecutor used the word "kidnapped" in referring to this evidence (R. 3700; see C. Br. 71) the court, after objection by defense counsel stated "the use of the word 'kidnapped' is rather rhetorical. I do not know whether the evidence quite justifies it" (R. 3700). As to petitioner Roselli (R. 3695; see Br. 71) there was proof that he was receiving a mysterious income of $600 a month from Casey (Defendant's Exhibit HHH, R. 4016). The references to the vulnerability of theater owners to vandalism (see C. Br. 69) was based on testimony in the record (see *supra,* p. 24) and was in any event merely a statement of a fact known to everyone, that motion pictures are exhibited in the dark. The prosecutor's reference to possible disclosures which might result from convictions in this case (R. 3710; see C. Br. 71, K. Pet. 30) was corrected by the judge who, on objection by defense counsel, stated "I think we might better

confine our argument to the present and let the future take care of itself" (R. 3710).

Petitioner Kaufman's objection to the prosecutor's reference to the witness Roach (K. Pet. 17, 30) is unjustified since the testimony had not at that time been stricken and Kaufman's counsel had himself referred to it (R. 3605–3606). When the judge stated that he was going to instruct the jury to disregard the testimony the prosecutor made no further reference thereto (R. 3629). The summary of the testimony linking Kaufman with Zwillman (see K. Pet. 17, 18, 29–30), was based upon the record; the propriety of admitting such testimony is discussed *infra*, p. —. The reference to Kaufman's failure to call his associate (see K. Pet. 17), was in reply to suggestions by Kaufman's counsel that the Government failed to offer available proof (R. 3573, 3590). The trial court characterized such arguments, on both sides, as immaterial (R. 3624).[10]

When the closing argument of counsel is read as a whole and in the light of the record, we think there can be no question as to its propriety. The Circuit Court of Appeals in denying an application for bail by petitioners other than Kaufman stated in a memorandum opinion filed June 5, 1944:

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[10] The suggestion (C. Br. 71, 77) that the Government called McLane merely to show that he was afraid to testify is refuted by the prosecutor's account of his reasons for calling McLane (R. 2345–2347).

> So far as we can see, this "appeal involves no substantial question which should be determined by the appellate court." The only question which has the least trace of plausibility is the supposed impropriety of the prosecution's summing up. At the argument we were impressed with this possibility, as to which two members of the court expressed themselves vigorously; but upon examination it appears that the summing up was quite within the permissible limits.

4. The various objections to the judge's charge are without substance.

(a) The argument (C. Pet. 12–15, 20, 25; C. Br. 3, 8, 31–42) that the court erred in failing to submit to the jury the question of whether the activities here involved came within the statutory exemption of acts designed to secure bona fide payment of wages is frivolous. There was never any contention in this case that the payments by the exhibitors and producers here involved were for any bona fide labor union purpose. The whole theory of the prosecution, amply established by the evidence, was that the petitioners other than Kaufman, constituting an organized gang in no way connected with the union, used the union as a means of extorting funds for their personal benefit, and that Kaufman, together with Bioff and Browne, used their union positions knowingly to further such ends. These petitioners did not contend that

the payments were for genuine union purposes; as appears from the opening argument of their counsel, their contention was that the payments were bribes voluntarily given (R. 84–85, 87–88). Petitioners never requested the judge to instruct the jury as to the labor union proviso. Number 16 of their additional requests to charge (R. 3780) to which they now refer (C. Br. 34), is not clear, but at most sought an instruction that petitioners were not guilty if the money was paid to Bioff and Browne to prevent a strike. This instruction was properly refused. The fact that coercion designed to accomplish a genuine union objective has been held exempt under the act certainly does not preclude prosecution of persons who use their union position, not for union purposes, but for their own personal benefit. *Nick* v. *United States,* 122 F. 2d 660, 669–670 (C. C. A. 8), certiorari denied, 314 U. S. 687.

(b) Contrary to petitioners' contention (C. Pet. 16–18, 22, 23, 25–26; C. Br. 4, 8–9, 42–52, 61–62; M. Pet. 6–7, 15–16), the judge properly instructed the jury in respect of interstate commerce. That the exhibition of motion pictures is an industry affecting interstate commerce within the reach of federal power, has been too recently decided to require discussion. *United States* v. *Crescent Amusement Co.,* 323 U. S. 173; see also *Nick* v. *United States, supra.* Petitioners constantly refer to Barger's Rialto Theater as a burlesque house but

the evidence is clear that he showed motion pictures and stage shows alternately, and that the motion pictures were products of the large producing companies (R. 2110–2111, 2115). The integrated character of the production, distribution and exhibition fields of the motion picture industry was fully developed by the evidence (R. 1327–1328, 1524–1525, 1547–1548) and petitioners themselves concede that "the producers in Hollywood are so closely connected with the exhibitors that neither the producers nor exhibitors could withstand a strike in the Chicago theaters" (C. Pet 4). The judge gave the instruction requested by petitioners as to interstate commerce (R. 3721; see R. 3766–3767). His subsequent statement that "it does not seem to me that there is any contradiction as to the first one, that is, that whatever was done was done in connection with or in relation to an act in some degree affecting interstate commerce or an article or commodity moving in such commerce" (R. 3722) was clearly justified in view of the undisputed evidence as to the character of the motion picture industry.[11]

(c) As to the statute of limitations (C. Pet. 18, C. Br. 4, 10, 64–68; M. Pet. 7–9, 17–18, K. Pet. 20) the judge specifically singled out this subject

[11] The judge's statement (R. 3722) that nothing was said about interstate commerce in the summations was correct. The references to which petitioners now point (C. Br. 45) are merely summaries of the indictment (R. 3378, 3503–3504).

for detailed discussion (R. 3731–3734). Petitioners Compagna, and others have quoted one paragraph out of its context (C. Br. 64) and ignored the preceding page and one-half in which the judge noted the claim of withdrawal by several of the petitioners and carefully instructed the jury in accordance with well established law that, if a person is once shown to have been connected with a conspiracy, he must, in order to escape liability for subsequent acts, prove an affirmative act of withdrawal before the period of limitations. *Hyde* v. *United States,* 225 U. S. 347, 369; *Local 167* v. *United States,* 291 U. S. 293, 298; *United States* v. *Perlstein,* 126 F. 2d 789, 798 (C. C. A. 3), certiorari denied, 316 U. S. 678; *United States* v. *Graham,* 102 F. 2d 436, 444 (C. C. A. 2), certiorari denied, 307 U. S. 643.[12]

(d) Petitioner Kaufman contends (K. Pet. 18–19, 30–31) that the court erred in failing to charge the jury as requested that the defendant's plea of guilty serves as a continuing denial of the evidence offered against him. The language of the requested instruction is from an opinion of the Circuit Court of Appeals for the Third Circuit in

[12] Petitioner Maritote's suggestion (M. Pet. 17–18) that he should be held to have withdrawn from the conspiracy because of the absence of proof of his activities after 1937 finds no support in the cases. As to the sufficiency of the evidence to convict Maritote (M. Pet. 6, 10–14), the evidence is clear that he was more than a passive observer; he actively benefited from the conspiracy through the receipt of more than $13,000 from Barger (see *supra*, p. 11).

United States v. *De Angelo,* 138 F. 2d 468, discussing the effect of an acquittal as *res judicata.* That case does not hold, as petitioner apparently contends, that such an instruction must be given upon request. Here, the trial judge instructed the jury fully on the presumption of innocence, and the necessity of proof beyond a reasonable doubt (R. 3715–3717). He specifically charged the jury that: "A defendant's plea of not guilty to the indictment puts in issue every material allegation of fact contained in the indictment and thus places upon the Government the burden of proving such defendant's guilt beyond a reasonable doubt" (R. 3717).

(e) The judge's remarks on the right of review (see C. Pet. 19, C. Br. 4, 11, 68–69) were made casually as an apology for the fact that he was reading his charge (R. 3712) and as emphasizing that the function of defining the law was for the court (R. 3714). They conveyed to a metropolitan jury no knowledge which it did not already have. Furthermore, on exception by counsel for the defense, the judge withdrew the comment and told the jury to disregard it (R. 3740).

5. The record shows that after the jury retired, at 12:50 P. M., the judge stated in the presence of counsel that he had received a request from the jury for certain evidence; that, on his way to the courtroom he had stopped and asked the jury if they wanted the testimony read, and that upon receiving an affirmative reply he had told them

to go to lunch and that in the meantime arrangements would be made to read the testimony to them (R. 3744). No defense counsel voiced any objection to the judge's actions. Petitioners contend (C. Pet. 19–20, 23; C. Br. 4, 12, 78–84) that this communication to the jury requires reversal of the convictions herein.

We think that the Circuit Court of Appeals was clearly correct in holding "There can not be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused" (R. 4196). The cases upon which petitioners rely (Br. 80–84), in which reversals were predicated upon some private communication with the jury in the absence of counsel, all involve situations in which the communication to the jury related to an issue in the case. Here it is clear that there was no communication relating to an issue in the case and therefore no possibility of prejudice. Cf. *United States* v. *Graham,* 102 F. 2d 436, 444 (C. C. A. 2), certiorari denied, 307 U. S. 643; *Outlaw* v. *United States,* 81 F. 2d 805, 808–809 (C. C. A. 5), certiorari denied, 298 U. S. 665.[13]

[13] There is, of course, no warrant for petitioners' implication (C. Br. 79–80) that the judge gave less than a full account of what occurred in the jury room. The same is true of petitioners' reference (C. Br. 79) to other notes sent by the jury (see R. 3745) and their attempt to imply that some impropriety occurred in connection therewith because the record merely contains the statement of the judge following a notation "(After reading note from jury)."

6. Petitioner Kaufman makes several contentions applicable to his conviction alone.

(a) His chief contention (Pet. 11, 12–13, 24–27) is that the evidence does not justify his conviction for conspiracy. He states (Pet. 11) that "the only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged in the indictment was the testimony of the Government's principal witness directly denying petitioner's participation." Such is not the case. The strongest direct evidence against Kaufman was the fact that he received $20,500 from Warner Bros. under circumstances indicating clearly that it was not for a legitimate union purpose and that he himself stated that $15,000 of that money went to Bioff (see *supra,* pp. 16–18). Bioff's testimony about Kaufman's request for help and about his own conversation with Warner Bros.' representative (*supra,* p. 16) is merely corroborative of the inference from Kaufman's own admission that Kaufman was relying upon Bioff's strength to support his demands. In view of this evidence it could reasonably have been inferred that Kaufman knew the source of Bioff's power on which he was relying. Even if Kaufman were unaware of the identity of Bioff's coconspirators, such fact would not absolve him so long as the evidence established that Kaufman was willing to use the power of the conspirators to further his own ends and was, according to his own admis-

sion, willing to aid that conspiracy by turning over to it $15,000. If Bioff was telling the truth when he testified that Kaufman did not in fact turn over the $15,000 (*supra,* p. 18), it was nevertheless true that Kaufman was using the conspirators' powers in aid of his own purposes. Kaufman stresses, as proof of innocence, the fact that the Newark representatives of Warner Bros. testified that he made no threats in the course of negotiations which resulted in the payments (Pet. 12). It is a reasonable inference that, if Warner Bros. felt called upon to pay $20,500 to Kaufman without threats it was because they were already well aware of the power which could be mobilized on his behalf.

(b) The challenged evidence (Pet. 10–11, 23–24) that in 1934 the members of the outfit stated that they would secure Kaufman's vote for Browne (*supra,* p. 8) was clearly admissible against all the other petitioners as statements made in the course of the conspiracy for a definite purpose in furtherance of the conspiracy. Such statements were, of course, not proof that Kaufman was a member of the conspiracy but, when independent proof connected Kaufman with the conspiracy, the acts of his co-conspirators in the course of the conspiracy were admissible against him. *United States* v. *Manton,* 107 F. 2d 834, 848 (C. C. A. 2), certiorari denied, 309 U. S. 664; *Marino* v. *United States,* 91 F. 2d 691, 696 (C. C. A. 9), certiorari denied *sub nom.*

Gullo v. *United States.* 302 U. S. 764; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C. C. A. 8); *Laska* v. *United States,* 82 F. 2d 672, 677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *Baker* v. *United States,* 21 F. 2d 903, 905 (C. C. A. 4), certiorari denied, 276 U. S. 621; *Van Riper* v. *United States,* 13 F. 2d 961, 967 (C. C. A. 2), certiorari denied *sub nom. Ackerson* v. *United States,* 273 U. S. 702. The declarations here involved were not, like those in the cases upon which petitioner relies (K. Pet. 23–24), merely statements by a co-conspirator designed to show petitioners' membership in the conspiracy but were declarations in furtherance of the conspiracy itself.

(c) There was evidence that, on January 19, 1942, four months after his arrest on a prior indictment against Kaufman and Circella (see R. 13), Kaufman stated at a meeting of his local that "there were some people in the room who would want to have him in jail but that he wouldn't go to jail and that he would be here and alive when the others would be dead and they wouldn't die a natural death" (R. 2296, 2301). As the court below held (R. 4201), this "testimony as to what Kaufman said at a public meeting, held after Bioff's doings began to be bruited, was susceptible of being understood as a threat against any present who had testified against him. It was competent under the plainest principles, and its admissibility did not depend upon its truth." Compare

Banning v. *United States,* 130 F. 2d 330, 338 (C. C. A. 6), certiorari denied, 317 U. S. 695; *Vause* v. *United States,* 53 F. 2d 346–354 (C. C. A. 2), certiorari denied, 284 U. S. 661; *Madden* v. *United States,* 20 F. 2d 289, 294 (C. C. A. 9), certiorari denied *sub nom. Parente* v. *United States,* 275 U. S. 554. To hold, as petitioner contends (K. Pet. 13–14, 27–28), that such threats are not admissible unless the threatener directly refers to the charge against him would be merely to encourage carefully veiled but well understood threats of like character.

(d) Contrary to Kaufman's contention (K. Pet. 14–15), evidence that in 1932 Kaufman and his associates opened negotiations with Warner Bros. by placing a gun on the table was clearly admissible to show the plane on which those and subsequent negotiations were conducted. In part this testimony helps to account for Warner Bros.' willingness to pay $20,500 in the years from 1936 to 1940 without direct threats on Kaufman's part.

(f) Kaufman offered to prove that in 1936, while his local was involved in litigation,[14] he appealed to Bioff and Browne for assistance and that such assistance was denied (R. 3079–3081). He now claims that refusal of the court to admit such evidence was reversible error (Pet. 15–16,

[14] The details of that litigation appear in recorded opinion of the New Jersey Chancery Court. *Collins* v. *IATSE Local No. 244,* 119 New Jersey Equity 230 (1935).

29). It is clear, however, that admission of evidence on such a collateral matter could have given rise to many collateral issues. The proposed testimony was not direct proof that Kaufman was not part of the conspiracy with Bioff and Browne; it was direct proof merely that Bioff and Browne did not wish to intervene in that matter. Their reasons for doing so may have been based on many grounds other than the fact that Kaufman was not a co-conspirator. The admissibility of such evidence was a matter peculiarly within the discretion of the trial judge and presents no issue for appellate review.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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OCTOBER TERM, 1944

No. 946

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THE UNITED STATES OF AMERICA.

REPLY BRIEF

This reply to the Government's brief in opposition to the petition for a writ of certiorari is submitted primarily for such assistance as may thereby be afforded to the Court in collating those questions presented by the petition, based upon the record in this case, which apparently (if not adroitly) have not been taken into account in the opposition offered.

Distortion of the issues is not helpful in considering whether this case is worthy of a full hearing on the merits. Too much prejudice has intervened below. This Court is the last resort for the correction of unjust, and for the preservation of proper, legal standards.

Of course, comparing the questions presented on pages 9 through 20 of the petition with the Government's statement of the questions in its brief on pages 2 and 3 will demonstrate at once that instead of any effort to show that the case does not present these questions, many of them simply have been ignored. Nevertheless, these questions persist.

For the convenience of the Court the argument of the Government, and particularly the lack of argument, is now discussed as pertaining to each of the reasons relied upon in the petition for the allowance of the writ, in the order there enumerated.

I

(Petition, pp. 20-22)

The Government's brief (pp. 22-24) avoids meeting the proposition that the indictment invaded petitioner's constitutional right to be truly informed. The Government seeks to treat the matter simply as a variance. While as well a variance, the false allegation that Rio, Zwillman and Buchalter (not to overlook Barger) were unknown to the Grand Jury was more than that, it was a deliberate deception. These individuals were known to the Grand Jurors who presented them as unknown. The question persists whether such an indictment, demonstrated to contain false allegations, violates constitutional provisions for the protection of a defendant.*

While the Government's brief purports to offer some excuse for the failure to name Rio and Zwillman, not even the least excuse is suggested for the failure to name Buchalter, who, if the Government's proof was credible, was as deeply involved, and so shown to be by the most direct evidence, as anyone in the case. Buchalter was still alive at the time of trial.

If the excuse offered for omitting the name of Zwillman (and of course it was no excuse at all for not naming him as a conspirator but not a defendant,—as others were so named) were at all sincere, then what is the excuse for the references in the prosecutor's argument and now in the

* See also, IX, page 8, *infra*.

Government's brief, attempting to link petitioner to Zwillman and through Zwillman to the conspiracy? *

Zwillman and Buchalter were the very persons claimed to be the link—and the only link—between this petitioner and the other alleged conspirators.

II

(Petition, page 22)

Petitioner urged that the practice in the Second Circuit governing bills of particulars in criminal cases is so inconsistent with what this Court has indicated to be proper, that action by this Court is required. In a footnote on page 22 of its brief, the Government asserts that petitioner is in error in stating that a bill of particulars was denied. Reference to the record will show that for all practical purposes, particulars were denied. The single item allowed could serve no practical purpose in the preparation for trial upon the indictment. The single item of particulars allowed did not touch the situation of the "unknown" persons.

III

(Petition, pp. 23-24)

The Government's brief (pp. 37-38) concedes that the hearsay statements "were, of course, not proof that Kaufman was a member of the conspiracy but, when independent proof connected Kaufman with the conspiracy the acts of his co-conspirators in the course of the conspiracy were admissible against him".

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* For example, the argument on pages 8, 18 and 29 and the footnote on page 18 of the Government's brief. Incidentally, in that footnote the Government failed to point out that all of the matters mentioned therein took place years after the time of the alleged hearsay conversations.

Note also the statement in the prosecutor's summation (R. 3631): "Now the indictment still charges that these defendants conspired with certain persons who were to the Grand Jurors unknown, and I think in the course of the trial your knowledge of those persons has been somewhat extended."

The fault with the Government's argument is that it ignores altogether, as though because of its silence this Court would not notice, the essential nature of petitioner's complaint, that the Trial Court refused to charge the jury that petitioner's connection with the conspiracy could not be found from that hearsay. Instead, the Trial Court charged that the hearsay was "not alone sufficient".

An examination of the cases cited in the Government's brief and examination of the cases cited by petitioner from the Sixth, Eighth and Tenth Circuits as well as from this Court, will show that the case at bar stands alone in giving approval to the use of hearsay declarations together with other evidence for the purpose of showing connection.

The Government's brief fails to recognize, also, that without the aid of the hearsay, all of the testimony concerning payments by Warner Bros. to Kaufman can afford no basis for any inference (a) that Kaufman knew of any conspiracy, and (b) much less, that he was a member of it.

Since the Trial Court refused to instruct the jury that this hearsay could not be considered as proof to connect petitioner with the conspiracy, but on the contrary said only that such hearsay was "not alone sufficient to establish a connection", it cannot be said that the jury did not take the hearsay into account in deciding the issue of connection.

IV

(Petition, pp. 24-27)

The Government's brief (pp. 36-37) assumes quite without foundation that it is petitioner's chief contention that the evidence does not justify his conviction. On the contrary, that is a subsidiary question because of the improper submission of the case to the jury, the improper indictment, the improper conduct of the prosecutor and the other questions of law set forth in the petition.

The Government says that it is not true as stated in the petition that "The only direct evidence in the case concerning petitioner's alleged connection with the conspiracy charged in the indictment was the testimony of the Government's principal witness directly denying petitioner's participation."

But in his summation the prosecutor said (R. 3630-3631) "In this case we are fortunate, because some of the conspirators testified before us. In most cases you can only prove a conspiracy by indirect evidence."

Now the Government says that "The strongest direct evidence against Kaufman was the fact that he received $20,500 from Warner Bros. * * *." Surely, the Government's counsel is confused. That was clearly circumstantial evidence, and it cannot be disguised merely by labeling it "direct". It remains circumstantial evidence despite the Government's assertion and, for the reasons pointed out in the petition, certainly equivocal at most.

V

(Petition, pp. 27-28)

The Government's brief (pp. 38-39) makes no effort to distinguish the authorities and the cases cited in the petition, nor to dispute that the ruling here is contrary to the decisions of this Court and in direct conflict with decisions in other Circuit Courts of Appeals.

Instead, three citations are offered to support the admissibility of the evidence. The *Banning* case (130 F. [2d] 330) does not touch this question at all; that case had to do with an effort to fabricate evidence. In the *Vause* case (53 F. [2d] 346) and the *Madden* case (20 F. [2d] 289) the proof was unmistakable that the spoliation there involved had direct relation to the case on trial.

It is precisely this petitioner's contention that evidence of spoliation can be admitted only where the effort has direct connection with the case on trial. It certainly does not impeach petitioner's argument to cite cases which stand for the very rule petitioner urges.

VI

(Petition, p. 29)

The Government's brief (pp. 39-40) on this point seems to ignore the Government's own argument elsewhere that petitioner was using the power of Bioff and Browne in aid of his own purposes. Petitioner's offer was to show that they refused to use their power on the only occasion when he asked them to do so.

Had the evidence not been excluded, the prosecutor might not have been able to argue in summation (R. 3656) that there was some significance in a telephone call from the apartment of Bioff and Browne in New York to the petitioner, which the prosecutor described as occurring "during the height of the extortions in April, 1936", and (R. 3657) "It is a fair inference that under the appropriate circumstances, he [Kaufman] knew he could call on Zwillman, on the Chicago mob or on Bioff or Browne to enforce the collection of the particular tribute".

VII

(Petition, pp. 29-30)

The Government's brief (pp. 26-30) argues that the statements in the prosecutor's summation, of which petitioner complains, were amply supported by the evidence. It is unfortunately true that evidence was improperly admitted which undoubtedly was offered in the first instance only to provide a basis for the prosecutor's appeal to prejudice.

But:

Was it "fair summation" for the prosecutor to state that there was proof of association between Zwillman and the Chicago defendants, upon hearsay testimony which the Government elsewhere argues (Gov't Brief, p. 23) was not sufficient to link Zwillman with the conspiracy?

Was it "fair summation" to urge the jury to draw inferences unfavorable to the petitioner from his failure to produce Buchalter and Zwillman as his witnesses? Even in the Government's brief, Zwillman is described as Kaufman's associate!

Was it "fair summation" for the prosecutor to ask for petitioner's conviction so that he might be induced to become a witness against Zwillman, and to describe the latter as his "higher-up"? This reference was hardly cured by the innocuous statement of the Trial Court quoted in the Government's brief. Even had the jury been instructed to disregard this argument, as petitioner requested (Supplemental Request, R. 3790), it is doubtful whether the damage could have been remedied. But even that request was denied (R. 3737).

Was it "fair summation" for the prosecutor to suggest that the Government witness Roach had perjured himself in collusion with the defendants? * The Government's brief is quite in error in stating (p. 29) that the prosecutor made no further reference to Roach's testimony after the Trial Court said that the jury was going to be instructed to disregard the testimony. Even after the Trial Court's statement, the prosecutor persisted in suggesting (R. 3629) that the jury could draw inferences from Roach's testimony.

Was it "fair summation" for the prosecutor to argue that inferences should be drawn against petitioner because petitioner's counsel had objected to a question directed to the witness Jacocks, in an effort to adduce his testimony concerning a statement made to the witness out of petitioner's presence by a third person who had died prior to the trial; and was it "fair summation" to criticize petitioner's counsel because they did not ask Jacocks what the deceased person had said to him?

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* And this, in spite of the extreme efforts of petitioner's counsel to have Roach kept from the witness stand (R. 2335-2337 and R. 2361-2362).